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TRASHION: AN ANALYSIS OF INTELLECTUAL PROPERTY PROTECTION FOR THE FAST FASHION INDUSTRY

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Abstract

Intellectual property law strives to provide a climate for invention, ingenuity and imagination to prosper. The standard theory, featured prominently in relevant international and national IP law regimes, is that copyists stifle the incentive for innovation. Yet, in an industry with copying at its heart, firms are prospering contrary to the above standard. This is fashion and, arguably, copying is what it is all about, after all. This paper examines how intellectual property theory works in the fashion industry and explores the idea that copying designs stimulates fashion innovation, thus generating a 'piracy paradox'. Further, it aims to scrutinise the pertinent theses of induced obsolescence, flocking and differentiation, suggesting an analysis of the interaction between intellectual property rights, economics and competition law.

Keywords: intellectual property, fashion industry, design, copyright

Introduction

'What do you fill your trash bags with? Fast fashion?' Stella McCartney, Trashion Show 2018. Fashion is the world's seventh largest industry, worth 2.4 trillion dollars.² Arguably, even if you are out of fashion you are in fashion because everyone uses clothes. Fashion has intrigued economists, social thinkers and cultural theorists for embodying 'representative characteristics of modernity, and even of culture itself'.³ Retailers 'receive daily shipments of new merchandise in order to perpetuate the feeling that styles are 'out of trend' as quickly as they

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² The Business of Fashion, McKinsey & Company, *The State of Fashion 2017* report, November 2016, 6.

(<https://www.mckinsey.com/~media/McKinsey/Industries/Retail/Our%20Insights/The%20state%20of%20fashion/The-state-of-fashion-2017-McK-BoF-report.ashx>)

³ Hemphill, C. S. and Suk. J., 'The Law Culture and Economics of Fashion,' 61 *Stanford Law Review*, 1147, 1149.

came in', a process that intentionally causes 'the consumer to feel that their clothes are out of style after only the first wear'.⁴ This fashion cycle is driven by the latest designs and innovation, and as new designs are introduced increasingly quickly, older designs become ever more rapidly obsolete.⁵ This is fast fashion.

Fast fashion is at its zenith with cheap clothing being produced rapidly by mass-market retailers in response to the latest trends.⁶ No longer producing a Spring-Summer line and an Autumn-Winter collection six months later,⁷ designers now follow fleeting trends to produce cheap garments, swiftly satisfying the appetite of the consumer.⁸ Lead times have been reduced from six months to zero, pursuing to quench shoppers' thirst for instant gratification.⁹ These garments are made for the short term, worn while on trend and then discarded.¹⁰ The desire for constantly new clothing has meant that in the UK two million tonnes of clothing is thrown out each year equating to £140 million worth of waste.¹¹ It is easy to see why the fast fashion industry has been labelled 'trashion'.¹²

Intellectual property (IP) 'refers to unique, value-adding creations of the human intellect that results from human ingenuity, creativity and inventiveness',¹³ including designs, artistic works, innovations, names and images. It is crucial to protect IP in order to encourage and safeguard investment in innovation, thus creating an environment that stimulates further innovation and spurs economic development.¹⁴ In the majority of industries, copying suppresses the incentive

⁴ Elrod, C., 'The Domino Effect: How Inadequate Intellectual Property Rights in the Fashion Industry Affect Global Sustainability,' (2017) 24(2) *Indiana Journal of Global Legal Studies*, 575, at 578.

⁵ Barnes, L. and Lea-Greenwood, G., 'Fast Fashioning the Supply Chain: Shaping the Research Agenda,' (2006) 10(3) *Journal of Fashion Marketing and Management*, 259, 269–71. See also, Joy, A., et al., 'Fast Fashion, Sustainability, and the Ethical Appeal of Luxury Brands,' (2012) 16 *Fashion Theory*, 273, 273–74.

⁶ The Business of Fashion, McKinsey & Company, *The State of Fashion 2018* report, November 2017, 19 (accessed at: https://cdn.businessoffashion.com/reports/The_State_of_Fashion_2018_v2.pdf). See also, Elrod, 'The Domino Effect', 575.

⁷ Bhardwaj, V. and Fairhurst, A., 'Fast Fashion: Response to Changes in the Fashion Industry,' (2010) 20 *The International Review of Retail, Distribution and Consumer Research*, 165. See also, Doyle, S., et al., 'Supplier Management in Fast Moving Fashion,' (2006) 10(3) *Journal of Fashion Marketing and Management*, 272.

⁸ Elrod, 'The Domino Effect', 578

⁹ McKinsey & Company, *The State of Fashion 2017* report, 18-21. See also, Tyler, D, et al., 'Supply Chain Influences on New Product Development in Fashion Clothing,' 10(3) *Journal of Fashion Marketing and Management*, 316 at 319 .

¹⁰ Searle, N and Brassell, M., *Economic Approaching to Intellectual Property*, (2016, Oxford University Press), 115.

¹¹ Ditty, S., 'It's Time for a Fashion Revolution,' *Fashion Revolution White Paper*, December 2015, 11.

¹² Stella McCartney, Trashion, Spring-Summer 2017.

¹³ Kalanje, C., 'Role of Intellectual Property in Innovation and New Product Development,' WIPO.

¹⁴ Intellectual Property Office, *Promoting Innovation and Growth: The Intellectual Property Office at Work*, (2016, Government Publications) 6 .

to innovate and strong IP laws such as patents and trademarks are vital. To what extent this general rule applies to the fashion industry is, however, debatable. There is no law that specifically protects every aspect of a fashion garment from copying. One is then led to assume that, since there is no complete protection and the copying of fashion designs is allowed to occur, the industry should be lacking innovation and faltering. Yet, statistics show consistent global fashion industry sales' growth, predicted to increase by 4.5% in 2018.¹⁵ This paper seeks to investigate how and why the fashion industry continues to be successful, despite IP law allowing copying to occur.

1 A Comparison of Intellectual Property Options for Fashion Designs

'Imitation is the highest form of flattery' – Coco Chanel

Intellectual property protection for fashion designs varies significantly between jurisdictions; at one end of the spectrum, French *Propriete Intellectuelle* affords specific protection for fashion designs, while at the other end the United States fashion industry essentially exists in a 'doctrinal no man's land'.¹⁶ US commentators Raustiala and Sprigman believe that this IP protection gap or 'negative space'¹⁷ results in fashion designers being 'vulnerable to a stitch-by-stitch, seam-by-seam replication' of their designs.¹⁸ The authors describe 'negative space' as 'a substantial area of creativity' not permeated by copyright and patent and for which 'trademark provides only very limited propertization'.¹⁹ The United Kingdom sits in the middle of these two contrasting approaches, presenting a patchwork IP rights framework and no specific provisions for fashion designs.²⁰

In the UK designs may be protected in several ways, including the UK registered design (UKRDR) and UK unregistered design rights (UKUDR) under the Copyright, Designs and Patents Act 1988.²¹ Regulation 06/2002 (EC)²² provides the registered Community design (RCDR) and Community unregistered design rights (UCDR), the EU equivalents to UK design rights. Copyright in relation to artistic works, trademarks and patents can be utilised by designers in order to protect certain aspects of a fashion design. This section examines IP

¹⁵ *The State of Fashion 2018* report, 76.

¹⁶ Rosenblatt, E., 'A Theory of Intellectual Property's Negative Space,' (2011), 34 (3) *Columbia Journal of Law and The Arts*, 317 at 323.

¹⁷ Raustiala, S. and Sprigman, C., 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design,' (2006) 92 *Virginia Law Review*, 1687 at 1764.

¹⁸ Wong, T., 'To Copy or Not to Copy, That is the Question: The Game Theory Approach to Protecting Fashion Designs,' (2013) 160 *University of Pennsylvania Law Review*, 1139 at 1140.

¹⁹ Raustiala and Sprigman, 'The Piracy Paradox', 1764

²⁰ Moultrie, J. and Livesey, F., 'Chapter 3: Design Right Case Studies,' *Report on the Economics of Design Rights*, (2011) The Intellectual Property Office) 1.

²¹ ss.213-64(III) Copyright, Designs and Patents Act 1988.

²² Council Regulation (EC) No. 06/2002 12 December 2001 on Community Designs

protection options that exist in UK law in comparison with those of other jurisdictions, aiming to establish whether the UK fashion industry exists in an IP negative space. The UKUDR protects the shape and configuration of a design²³ and excludes surface decoration.²⁴ A design must be original and not commonplace to qualify.²⁵ The protection offered by the UCDR is focused on lines, texture and materials,²⁶ with the validity requirements of novelty and individual character. There are significant differences between the UKUDR and UCDR. The UKUDR has complex qualification criteria, limiting its use in the protection of fashion designs as surface decoration is excluded. UCDR protections fill this gap.

*Karen Millen v Dunnes*²⁷ highlighted how fast fashion designers can use UCDR to protect garments, clarifying the interpretation of Art. 5 ('novelty') and Art. 6 ('individual character') EU Regulation 06/2002 and outlining the scope of protection. Karen Millen claimed Dunnes sold copies of three KM garments in their Irish stores. Dunnes appealed the High Court judgment, which asserted KM to be the UCDR holder for these garments, to the Supreme Court. The first appeal ground was that the garments did not have the element of 'individual character' required for an UCDR holder under Art. 6. The second ground was Dunnes' argument that KM must prove the garments had 'individual character' within the Regulation's meaning.

The Supreme Court referred to the Court of Justice of the European Union to determine the meaning of 'individual character' regarding both Art. 25(1) World Trade Organisation's agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and Art. 85(2) of the Regulation. Under TRIPS, 'members may provide that designs are not new or original if they do not significantly differ from known designs or combinations of known design features'.²⁸ The Supreme Court questioned whether KM was required to provide for the novelty or individual character of the design assessed by an examination of earlier designs. The CJEU asserted that no such requirement exists, as the TRIPS provision is expressed in 'optional terms'.²⁹ The interpretation of Art. 85(2) was also queried by the Supreme Court. The CJEU stated that a presumption of validity of a UCDR is created by the heading of Art. 85. Consequently, Art. 85(2) is interpreted to mean that a designer must merely show what the individual character of the design is, rather than prove the design to have individual character under Art.6(1). Thus, the legal onus of proof is on the plaintiff to establish a right to a UCDR

²³ *Ocular Sciences Ltd v Aspect Vision Care Ltd*. [1997] RPC 289 (Laddie J).

²⁴ *Lambretta Clothing Co Ltd v Teddy Smith (UK) Ltd*. [2005] RPC 6 (CA).

²⁵ S. 1(1)(3)(a) Intellectual Property Act 2014.

²⁶ Art. 3(a), Regulation 06/2002.

²⁷ *Karen Millen Fashions Ltd. v Dunnes Stores* [2014] All ER (D) 156.

²⁸ Art. 25(1) TRIPS Agreement.

²⁹ *Karen Millen Fashions Ltd. v Dunnes Stores and Another* C-345/13, [34].

and only shifts to the defendant if that right is challenged, to prove that a ground for invalidity is present on the balance of probabilities. It was subsequently concluded that 'individual character' relates to the overall impression produced, which must be a different overall impression from prior designs available to the public.

Unregistered design rights arise 'from the date on which the design was first made available to the public within the Community'.³⁰ Designers have the option of the UKRDR and RCDR to register their designs. This process can be costly and registration causes the system to be far slower than under UKUDR and UCDR. Registered rights are generally less useful than unregistered rights for fast fashion designs, as garments have an extremely short life cycle.³¹ Some online retailers such as Misguided have reduced lead time from design to shelf to just one week,³² a staggering change from previous biannual seasons.³³ Registered designs have the advantage of longer lasting protection, while registration creates more of a deterrent since rights holders need not prove deliberate infringement, unlike unregistered designs. Arguably, neither benefit is particularly valuable to fast fashion design protection, as garments are on trend for short periods of time. And one may conclude that unregistered rights provide suitable protection in such short life cycles.

The few court cases make it difficult to determine accurately how successful unregistered design rights are at protecting fashion designs. The effectiveness of the system could be implied by the adoption of similar legislation in other countries. The Australian Designs Act 2003 creates a design right system very similar to the UK framework, without the inclusion of an unregistered design right. To combat the potential gap in protection, the application for registered designs is simple and inexpensive. A design can be registered 'without substantive examination'.³⁴ In order to register, the design must be novel and distinctive when 'compared with prior art base for the design as it existed before the priority date of the design'.³⁵ The Australian system bases its similarity test on the view of an informed user, who must give more weight to similarities than differences. Due to the lack of case law in this area – as

³⁰ Art. 11(1), Regulation 06/2002.

³¹ Swaminathan. J.M., and Lee. H.L., 'Design for Postponement,' (2003) 11 *Handbooks in Operation Research and Management Science*, 199. See also, Bhardwaj, V. and Fairhurst, A., 'Fast Fashion: Response to Changes in the Fashion Industry,' (2010) 20 *The International Review of Retail, Distribution and Consumer Research*, 165 at 167.

³² McKinsey & Company, *The State of Fashion 2018* report, November 2017, 18.

³³ Bhardwaj and Fairhurst, 'Fast Fashion: Response to Changes in the Fashion Industry,' 166.

³⁴ Atkinson, V., et al., 'Comparative Study of Fashion and IP: Copyright and Designs in France, Europe and Australia,' (2016) 11 *Journal of Intellectual Property Law and Practice*, 496 at 524.

³⁵ *Review 2 Pty Ltd. v Redberry Enterprise Ltd* [2008] FCA 1588 [55].

Australia's copyright and design right system is underutilised by the fashion industry³⁶ – it is hard to determine the precise effect copyright and design right protections have on the fashion industry. US commentators have illustrated the significant difference in protection for fashion designs between the EU and the US, finding that 'the EU affords fashion designers an exclusive and independent right against design copying',³⁷ compared to what is often considered a lower level of protection afforded by US law. The US lacks effective UCDR or UKUDR equivalents, an apparent gap in IP protection that potentially creates a higher risk of copying.

The UK operates a closed list copyright system as s.3 Copyright, Designs and Patents Act 1988 provides eight categories of protectable works. Fashion designs are not specifically mentioned as a sub-category of artistic work, meaning garments only qualify protection under s.4(c) as works 'of artistic craftsmanship'. In comparison, France operates an open list system, allowing designers to enjoy broader protection³⁸ with specific provisions dedicated to fashion designs.³⁹

A fashion design must be both 'artistic' and a 'work of craftsmanship' to receive UK copyright protection; recent case law reveals the difficulty in defining 'artistic', especially with regard to fast fashion garments. If there is no intention to create an artistic work in creating the garment⁴⁰ or the purpose of the garment is not artistic⁴¹ it will not be eligible for copyright protection. In *Hensher v Restawhile*⁴² it was held that a design intended for mass production will not qualify as artistic; 'Craftsmanship' implies hand-made works and is easier to establish than 'artistic', especially in respect to haute couture and one-off pieces; there is no case law to ascertain whether mass produced fast fashion garments would qualify as 'craftsmanship'. The case law demonstrates that the threshold for 'artistic craftsmanship' is high. It may be concluded that courts are disinclined to acknowledge fashion designs as artistic work – particularly mass-produced fast fashion garments. Copyright is often used in conjunction with unregistered

³⁶ Batty, R., 'There Goes My Outfit: Copyright in the Fashion Industry in Australia and New Zealand,' (2009) 15 *New Zealand Business Law Quarterly*, 8 at 10.

³⁷ Jiminez, G., et al., 'Design Piracy Legislation. Should the United States Protect Fashion Design?' in Jiminez, G. and Kolson, B., *Fashion Law: A Guide for Designers, Fashion Executives, and Attorney's*, (2014, 2nd Edition, New York, Fairchild Books), 75.

³⁸ Article L.112-1 of the Intellectual Property Code .

³⁹ Hagin, L., 'A Comparative Analysis of Copyright Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works into the United States Copyright Regime,' (1991) 26 *Texas International Law Journal*, 341, 345.

⁴⁰ *Merlet v Mothercare Plc* [1986] RPC 115.

⁴¹ *LucasFilm Ltd and Others v Ainsworth and Another* [2011] UKSC 39 .

⁴² *Hensher v Restawhile* [1976] AC 64.

design rights to protect certain parts of fashion designs: in *John Kaldor v Lee Ann*⁴³ both copyright and unregistered design right protection were relied upon.

There is no formal registration or cost of protection which would appear to favour the speed of fast fashion and be advantageous to smaller designers. Nevertheless, heavy reliance on a protection method that does not require registration may cause difficulties, as the 'subsistence of copyright in a particular work [may be] more difficult to determine'; this may be a significant issue in the fast fashion industry due to 'inevitable similarities between works being produced almost simultaneously by many rival companies'⁴⁴. It is vitally important that designers who rely on unregistered protection maintain a record of their design process. In *John Kaldor v Lee Ann* a copyright infringement claim was dismissed due to lack of evidence throughout the creative process, whereas in *G-Star Raw v Rhodi*⁴⁵ the claimant's design process account was hailed as clear and compelling, evidence which immensely strengthened their case.

The Intellectual Property Clause of the US Constitution (Article I, Section 8(8)) authorises copyright protection, which operates in much the same way as UK copyright law. The clause exempts 'useful articles' from protection; meaning any design considered 'utilitarian' will not be protected. A particular creative element of a fashion design may qualify for protection if it exists 'independently of, the utilitarian aspect of the article'⁴⁶ and is capable of being separated. *Chosun v. Chrisha* concerned copyright infringement of a Halloween costume. It was held that the costume's sculpted animal head, considered the creative element, would qualify for protection as it could be separated 'from the costume without adversely impacting the wearer's ability to cover his or her body'⁴⁷. In *Jovani v. Fiesta*⁴⁸ it was held that 'applying sequins and crystals to the dress's bodice and using ruched satin at the waist and layers of tulle in the skirt' is not conceptually separable from the dress itself and cannot be protected by copyright. Arguably, then, copyright provides limited protection for US fashion designs as long as they are original,⁴⁹ have 'at least a minimal degree of creativity'⁵⁰ and the element worthy of copyright is conceptually separable. Images placed on utilitarian garments may qualify for copyright protection as in *Knitwaves v. Lollytogs*⁵¹ where 'puffy leaf appliqués on

⁴³ *John Kaldor Fabricmaker v Lee Ann Fashions* [2014] EWHC 3779.

⁴⁴ Atkinson et al., 'Comparative Study of Fashion and IP', 518.

⁴⁵ *G-Star Raw CV v Rhodi Ltd & Others* [2015] EWHC 216 (Ch).

⁴⁶ *Chosun International v. Chrisha Creations* 413 F.3d 324, 329 (2d Cir. 2005).

⁴⁷ *Ibid* 330.

⁴⁸ *Jovani Fashion, Limited v. Fiesta Fashions*, Court of Appeals, 820 F. Supp. 2d 569 (2d Cir. 2012).

⁴⁹ Colman, C., 'Copyright,' in Jiminez and Kolson, *Fashion Law: A Guide for Designers*, 46.

⁵⁰ *Feist Publications Inc v. Rural Tel. Serv. Co.* 499 US 340, 345 (1991).

⁵¹ *Knitwaves, Inc. v. Lollytogs, Ltd*, 71 F.3d 996 (2nd Cir. 1995).

children's sweaters were accorded copyright protection'.⁵² In *Maharishi v. Abercrombie*⁵³ it was held that the 'particularized expression of the dragon [placed on the pant leg] is protectable, not the idea of the dragon itself or even the idea of putting a dragon on pants'.

In France, Article L.112- 2.73 of the *Code de la Propriété Intellectuelle* sets out '*droit d'auteur*' (copyright law). The Code incorporates creations of the fashion industries of clothing and accessories⁵⁴ as qualifying for copyright protection. A design is required to reflect the author's personality to qualify as original⁵⁵, a requirement 'rooted within the tradition of '*droit moral*' (personality rights) in the '*droit d'auteur*'.⁵⁶ This is a significant difference from the UK's 'traditional common law focus on copyrights economic value'.⁵⁷ French copyright law demands originality, a requirement interpreted strictly⁵⁸ by the courts. In both *Vanessa Bruno v Zara*⁵⁹ and *Céline v Zara*⁶⁰, the former regarding copying an original dress design and the latter a shirt design, protection was refused as the creations were considered commonplace. French courts interpret originality in rather an *ad hoc* manner, looking at any works that may have inspired the design at issue.⁶¹ This haphazard system is likely due to the *Cour de Cassation* (Court of Appeal) having stated 'the specific nature of fashion should be taken into consideration'⁶² when examining the standard of originality. In a recent case concerning rubber bead soles⁶³ -a fashion trend at the time- it was held that these did not qualify as original due to insufficient creative endeavour distinguishing the design and inadequate reflection of the author's personality.

The global influence of the French fashion industry owes a great deal to specific IP provisions offering strong protections,⁶⁴ an approach deeply rooted in the country's history, with fashion being classified as an applied art since 1793.⁶⁵ Nevertheless, upon examination of relevant court decisions, proving 'originality' in France in order for a fashion design to qualify for

⁵² Colman, 'Copyright,' 47.

⁵³ *Maharishi Hardy Blechman Ltd. v. Abercrombie and Fitch Co.*, 292 F. Supp. 533 (2d Cir. 2003).

⁵⁴ Article L.112- 2.73.

⁵⁵ Cour D'appel de Paris, Pôle 4- chambre 1, 12 mai 2015, no. 14/11880.

⁵⁶ Atkinson et al., *Comparative Study of Fashion and IP*, 518.

⁵⁷ *Ibid.*

⁵⁸ Gauss, H., et al., 'Red Soles Aren't Made for Walking: A Comparative Study of European Fashion Laws', (2013) 5 *Landslide: American Bar Association Intellectual Property Law Publication*.

⁵⁹ *Vanessa Bruno c. Zara France*, CA Paris, Oct. 17, 2012.

⁶⁰ *Céline c. Zara France*, CA Paris, Feb. 27, 2013.

⁶¹ Hagin, 'A Comparative Analysis of Copyright Laws Applied to Fashion Works', 345.

⁶² Cour de cassation, Chambre civile 1, 20 mars 2014 12-18518, reported in (2014) Bull civ I n 54

⁶³ *Ibid.*

⁶⁴ Scadifi, S., 'Intellectual Property and Fashion Design,' in Peter K. Yu, *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, (2006, 4th Edition, Oxford, Praeger) 122.

⁶⁵ Liu, P., 'An Open Shield: Antitrust arguments against extending copyright protection to fashion designs,' (2014) 23 (2) *Information and Communications Technology Law*, 159 at 161.

copyright protection is seemingly no less difficult than proving 'artistic craftsmanship' in the UK. Assumed protection weaknesses in both jurisdictions can be overcome, combined copyright and unregistered design protections may protect specific design sections. The US, lacking a UCDR equivalent, is more heavily reliant on copyright protection. Although Congress attempted to further support copyright protection by passing an Innovative Design Protection Act⁶⁶ to confer quasi-copyright protection on fashion designs,⁶⁷ the US remains in a relative 'negative space' regarding design protection.

Trademarks and Patents

While used to protect logos, images and names, trademark law cannot protect product configurations,⁶⁸ its use in the protection of fashion garments being limited. The fashion industry is populated by familiar trademarks, including Louis Vuitton's famous 'LV' toile monogram and Louboutin red soles.⁶⁹ Trademark protection is only useful to well-known fashion brands, since a design must have acquired 'secondary meaning' as a source identifier to be trademarked. The *Two Pesos v. Taco Cabana*⁷⁰ US case defined secondary meaning as being widely recognised by the public for identifying the product's source company.⁷¹ Raustiala and Sprigman highlight the example of Burberry's distinctive plaid, which is trademarked, and some Burberry designs 'will visibly integrate a trademark to the extent that the mark becomes an element of the design'.⁷²

The UK offers one patent type, whereas the US provides both utility patents and design patents. As with trademarks, the use of patents is limited to brands and companies with the money to spend on expensive protection methods for their principal items. UK patents and US utility patents have limited use in the fashion industry, restricted to specific aspects of designs such as zips and Velcro.⁷³ Design patents are useful in the US fashion industry for accessories and footwear, for instance NIKE seeks design patents for trainers, rather than clothing garments. The United States Patent and Trademarks Office (USPTO) issues design patents after an examination of prior art, if the design is 'ornamental, novel, and not obvious to a

⁶⁶ Innovative Design Protection Act of 2012 (IDPA).

⁶⁷ Liu, 'An Open Shield', 161.

⁶⁸ Bainbridge, D., *Intellectual Property*, (2010, 8th Edition, Essex, Pearson), 655.

⁶⁹ Misthal, M., 'Trademarks and Trade Dress', in Jiminez and Kolson, *Fashion Law: A Guide for Designers, Fashion Executives, and Attorney's*, 27. See also, *Louboutin and another v Van Haren Schoenen BV* (2018) C-163/16, [27].

⁷⁰ *Two Pesos Inc. v. Taco Cabana Inc.*, 505 U.S. 763 (1992).

⁷¹ Misthal, 'Trademarks and Trade Dress', 36.

⁷² Raustiala and Sprigman, 'The Piracy Paradox', 1701.

⁷³ George de Mestral registered the original VELCRO patent on 13th September 1955 and the VELCRO brand continue to rely on patents (See, *Hooked on Innovation*, WIPO, accessed at: <http://www.wipo.int/ipadvantage/en/details.jsp?id=2658>)

designer of ordinary skill in the art'.⁷⁴ There are issues with reliance on both utility and design patents for protection of fast fashion designs, the most obvious being time delays. Design patents will be issued in the US in around 15 months, although, in some cases, a patent examiner can take around to 2 years to determine whether the design is eligible for protection.⁷⁵ 'Most fashion designs are obsolete'⁷⁶ within this lengthy time frame and 'by the time a patent issues on a particular design, it can easily have gone out of style'.⁷⁷ Furthermore, patents require a higher standard of originality than copyright protection does, as 'the design must be new and involve an inventive step'.⁷⁸ Therefore, patents and design patents are not suited to the fast fashion industry due to the speed of garment design and production, utilitarian aspects of clothing and the likelihood of following fashion industry trends leading to lack of the required inventive step.

As demonstrated, unregistered design rights provide an effective method to protect fast fashion garments. Other problems may surface if designers become over-reliant on their protection, as seen in several recent cases where the requirement to evidence the design process pointed to a potential key disadvantage. In *John Caldor v Lee Ann* the claimants relied on copyright and UCDR protection, yet both failed due to lack of design process evidence. Comparatively, in *G-Star Raw v Rhodi* the defendant lacked a paper trail demonstrating the development of design ideas for the jeans. In *Dalco v First Dimension*,⁷⁹ the defendants relied on the claim that their 'Daniel Rosso shirt' had been designed in March 2012, before the 'Dalco shirt' was designed in September 2012. However, they brought no evidence before the court indicating that date and the appeal failed. In order to assert an unregistered design right, the right owner must prove the design was 'published, exhibited, used in trade or otherwise disclosed' in such a way that the design 'could reasonably have become known to the circles specialised in the sector concerned'.⁸⁰ Note that these cases were heard before the Intellectual Property Enterprise Court (IPEC) established in 2013 to provide less expensive access to justice for claims simpler and less valuable than 'those suited for the Patents Court and general Chancery Division'.⁸¹ Such lower cost judicial alternatives could counter possible

⁷⁴ Ferrill, E. and Tanhehco, T., 'Protecting the Material World: The Role of Design Patents in the Fashion Industry,' (2011) 12 *North Carolina Journal of Law and Technology*, 279-280.

⁷⁵ Fryer, W.T., 'The Evolution of Marker Entry Industrial Design Protection: An International Comparative Analysis,' (1999) 21(12) *European Intellectual Property Review*, 618, 620.

⁷⁶ Monseau, S., 'European Design Rights: A Model for the Protection of All Designers from Piracy,' (2011) 48(1) *American Business Law Journal*, 27, 42.

⁷⁷ Rosenblatt, 'A Theory of Intellectual Property's Negative Space,' 326.

⁷⁸ Monseau, 'European Design Rights', 43.

⁷⁹ *Dalco v. First Dimension* [2015] EWHC 760 (IPEC)

⁸⁰ Art. 11 EC Regulation 06/2002

⁸¹ Courts and Tribunals Judiciary, Intellectual Property Enterprise Court Work, (accessed at: <https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/intellectual-property-enterprise-court/work/>)

reluctance of designers to pursue application of their design rights, if this were to be argued upon the relative paucity of cases making it to court, as observed at some point across Europe.⁸² The historical importance of fashion in France has effectively marked a greater body of case law though many cases appear in the naturally more litigious US jurisdiction.⁸³ As Atkinson et al comment, 'more case law does not necessarily mean more clarity, because there are often inconsistencies between decisions even of the highest court, which makes it difficult to identify what that law actually says'.⁸⁴ Even with the less expensive IPEC option, some designers are still turning to social media to shame and 'call out' design copying. In 2016 indie badge designer Tuesday Bassen took to social media to accuse fast fashion giant Zara of design plagiarism. In the US, this is the only viable option for some small designers to enforce their rights and avoid expensive court proceedings. Yet, informal social media shaming creates more issues than it solves, considering eventually the absence of law to enforce protection against claimed copying of designs or design aspects.

The protection afforded by UCDR is vital for designers at all levels in the EU fashion industry as it is free, occurs automatically once the design has been released and suits the speed of fast fashion. Rosenblatt emphasised the difficulty in fixing 'a precise boundary between IP's negative and positive spaces [...which] arises because IP's negative space is a low-IP zone rather than a no-IP zone'.⁸⁵ It is easy to agree with Raustiala and Sprigman to conclude that the US fashion industry is in negative space regarding IP protection for fashion designs, considering its reliance on patents, trademarks and copyright to protect garments. The most similar US protection to EU and UK design rights are design patents, but their success is severely limited in the industry since they take far too long to register. While the UK does not have specific provisions for the protection of fashion designs, it can be concluded that the respective fashion industry is not in an intellectual property 'negative space', thanks to unregistered design rights.

⁸² A limited number of cases could indicate out of court settlements; see Beltrametti, S. 'Evaluation of the Design Piracy Protection Act: Is the Cure Worse than the Disease? An Analogy with Counterfeiting and a Comparison with the Protection Available in the European Community,' (2010) 8(2) *North-Western Journal of Technology and Intellectual Property*, 147, 148.

⁸³ Raustiala and Sprigman 'The Piracy Paradox', 1744.

⁸⁴ Atkinson et al., *Comparative Study of Fashion and IP* 531.

⁸⁵ Rosenblatt, 'A Theory of Intellectual Property's Negative Space,' 324.

2 Trends, Novelty and Copying in the Fast Fashion Industry

'Trendy is the last stage before tacky' – Karl Lagerfeld

A copy is something made to be similar or identical to another. Within this definition there are a multitude of different levels of copying, making a definitive description hard to achieve. Inspiration, the process of being mentally stimulated to do something creative must be protected and encouraged. Whereas imitation, intended to simulate or copy something else, must be discouraged. The creation and pursuit of trends in the fast fashion industry makes the definition of copying and the distinction between inspiration and imitation especially difficult.⁸⁶ Intellectual property protection must strike the appropriate balance between inspiring innovation and restricting imitation.

Novelty, individual character and originality can be considered difficult concepts in the fashion industry for two reasons. First, fashion designers could be viewed as creatively limited as clothing must fit the human body and be functional.⁸⁷ WIPO suggests that there are few 'new' designs on the market and that 'difference is assessed by one-to-one comparisons [and] a single distinguishing feature' either of which 'may be enough to produce a unique overall impression and justify the protection of the extraordinary feature or the whole item'.⁸⁸ The second issue is that of trends. A fashion trend can be described as 'a particularly vivid manifestation of a general innovation pattern wherein those engaged in innovation continually seek after the new and different while, at the same time, converging with others on similar ideas'.⁸⁹ Trends typically 'develop cyclically with a return to historical styles and themes being common'.⁹⁰ Deciding whether a garment is novel with individual character becomes notably more difficult when the designer is following a trend.

Copying is a hugely broad term potentially covering anything from following a trend to outright design plagiarism. Miuccia Prada famously outlined the concept as 'we let others copy us. And when they do, we drop it'. Raustiala and Sprigman refer to this process as induced obsolescence, a product cycle whereby 'as fashion spreads, it gradually goes to its doom'.⁹¹

⁸⁶ Bhardwaj and Fairhurst, 'Fast Fashion: Response to Changes in the Fashion Industry,' 165.

⁸⁷ Atkinson, V., et al., 'Comparative Study of Fashion and IP', 531.

⁸⁸ Fischer, F., 'Design Law in the European Fashion Sector', *WIPO Magazine*, February 2008.

⁸⁹ Hemphill, C. S. and Suk, J., 'The Law Culture and Economics of Fashion,' 61 *Stanford Law Review*, 1147, 1152.

⁹⁰ Atkinson, 'Comparative Study of Fashion and IP', 531. See also, Bhardwaj and Fairhurst, 'Fast Fashion' 167 and Sproles, G., *Fashion: Consumer Behaviour Toward Dress* (1979, Minneapolis, Burgess)

⁹¹ Simmel, G., 'Fashion,' (1904) 10 *International Quarterly*, 130, 547.

or as Shakespeare stipulates, ‘the fashion wears out more apparel than the man’.⁹² Hemphill and Suk highlight that ‘the desire to be ‘in fashion’ captures a significant aspect of social life’.⁹³ A design that ‘is initially chic rapidly becomes tacky as it diffuses to the broader public’ and its desirability rises and then falls when more possess the garment.⁹⁴ Fig.1 illustrates a potential diagrammatic form of this ‘fashion cycle’ beginning with a trend theme which is diffused to exhaustion; this dissemination drives new designs. Raustiala and Sprigman believe copying increases the speed of this cycle enabling the diffusion of a trend causing its rapid exhaustion and in turn compelling the need for new designs. Such copying and following of trends is advantageous as it is the power that drives the fashion cycle.

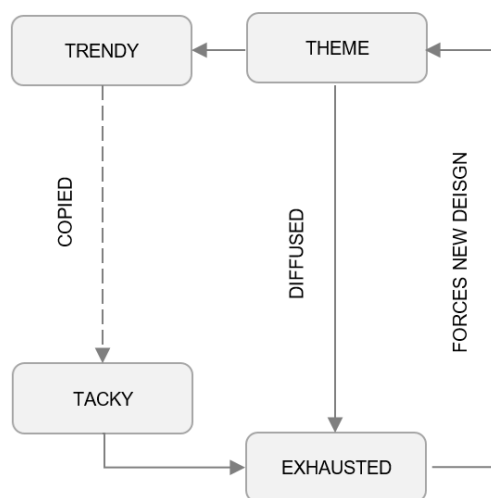


Fig.1

The US low-IP regime allows the copying of fashion designs. Raustiala and Sprigman believe that the ‘orthodox’ rules of IP are that cheap copies will ‘destroy the incentive to innovate and deter the investment that innovation demands, producers will fail to produce’. The fashion industry ‘provides an interesting and important challenge to IP orthodoxy’⁹⁵ because ‘design piracy and weak intellectual property protection are actually good’⁹⁶ for the industry especially as ‘the lack of copyright protection for fashion designers has not deterred investment in the industry’.⁹⁷ The industry’s ability ‘to continually produce creative work runs counter... to the conventional wisdom that IP rights are essential to spur investment in the creation of new works’.⁹⁸ This is Raustiala and Sprigman’s ‘piracy paradox’ theory that the paradoxical

⁹² Shakespeare, W., *Much Ado About Nothing*, Act. 3, Scene.3.

⁹³ Hemphill and Suk, ‘The Law Culture and Economics of Fashion’, 1149-1150.

⁹⁴ Raustiala and Sprigman, ‘The Piracy Paradox’, 1720.

⁹⁵ *Ibid.*

⁹⁶ Jiminez et al., ‘Design Piracy Legislation’, 69.

⁹⁷ Raustiala and Sprigman, ‘The Piracy Paradox’, 1775.

⁹⁸ Raustiala, K., and Sprigman, C., ‘When Are IP Rights Necessary? Evidence from Innovation in IP’s Negative Space,’ in Menell, P. and Depoorter, B., *Research Handbook on the Economics of Intellectual Property Law*, (2016, Cheltenham, Edward Elgar). See also Weinreb, L., ‘Copyright for Functional Expression’, 111 *Harvard Law Review*, 1149, 1235.

advantage of the US's low-IP regime actually encourages copying, pushing dispersion of trends and speeding up the fashion cycle to force new designs.⁹⁹

Hemphill and Suk suggest that differentiation and flocking are methods by which trends become adopted in fashion. Consumers flock around a recognizable design element or trend feature and all other design features on the garment are viewed as differentiating.¹⁰⁰ In contrast to Raustiala and Sprigman, Hemphill and Suk favour IP protection against the complete plagiarism of fashion designs as close copies serve flocking but not differentiation thus their proliferation is not innovative. The authors state that 'inspiration, adaptation, homage, referencing, or remixing'¹⁰¹ must be distinguished from the broad meaning of 'copying' as these differentiating elements make garments within a trend distinctive from one another. A clear line must be drawn between outright copying and reinterpretation to demonstrate what the law needs to cover in order to preserve free interpretation. Clarifying the interpretation of individual character and novelty is fundamental as this could affect the level of innovation in the fashion design industry. A broad interpretation could mean that any design following a trend may be in breach of a UCDR, restricting the flow of the fashion cycle. A narrower clarification to demonstrate a clear focus on a garment offering a different overall impression would be more likely to protect direct copies yet still allow the fashion cycle to operate.

Article 5 EU Regulation 06/2002 states, 'a design shall be considered new if no identical design has been made available to the public'. Designs 'shall be deemed to be identical [to a prior design] if their features differ only in immaterial details'¹⁰². The apparent differences between the two designs are examined and assessed for material and immaterial differences and a difference will not 'be regarded as immaterial if it is perceivable when the designs are placed side-by-side'.¹⁰³ Article 6(2) of the Regulation states a design to 'be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced by any design which has been made available to the public'. For a design to have individual character a different overall impression to any prior design must be constructed. It may be provided that 'designs are not new or original if they do not significantly differ from known designs or combinations of known design features'.¹⁰⁴ Individual character is interpreted by an informed user and the degree of freedom of the designer must

⁹⁹ Raustiala and Sprigman, 'The Piracy Paradox', 1722.

¹⁰⁰ Hemphill and Suk, 'The Law Culture and Economics of Fashion', 1164.

¹⁰¹ Ibid.

¹⁰² Article 5(2) Regulation 06/2002.

¹⁰³ European Commission, Legal Review on *Industrial Design Protection in Europe*, (2016), 110.

¹⁰⁴ TRIPS

be taken into account. The CJEU in *PepsiCo v. Grupo Promer* stated that for design rights, an informed user ‘has knowledge that lies somewhere in an intermediate range’, between an average consumer without specific knowledge and ‘the sectoral expert, who is an expert with detailed technical expertise’¹⁰⁵. Simply, the term refers to a user who is ‘particularly observant’ due to personal experience or extensive sector knowledge.

In *Magmatic v. PMS*¹⁰⁶ it was held that the ‘Kiddie Case’ did not have individual character as it did not produce a different overall impression from the existing design corpus within Art.4(1) of the Regulation. Individual character was examined in *Hensher v Restawhile*¹⁰⁷ in which the general character and distinctive individuality of the furniture were held to constitute a significant part of the whole concept of the design. The interpretation of individual character is also more complicated in fashion than furniture industry because of trends. The overall impression of Dunnes’ garments was identical to the overall impression of the Karen Millen garments; consequently, it was held that Dunnes had violated Karen Millen’s unregistered design right over the three garments.

In *Superdry v. Animal* the claimant relied on both UKUDR and CUDR protection as the defendant further asserted that the ‘academy gilet’ lacked individual character. In order to determine overall impression, the design in question must be compared individually with each design from the corpus nominated by the defendant. In this case, Ruehl and Abercrombie and Fitch gilets were brought forward as the two closest members of the design corpus. As neither of these had a hood, it was held that ‘the hood by itself has sufficient visual impact such that the overall impression produced by the First Design on the informed user differs from that produced by either the Abercrombie and Fitch or Ruehl gilets’. It was found that the claimant’s design had individual character as a different overall impression was produced by the gilet in question than either of the others brought forward for comparison by the defendant.¹⁰⁸

UKUDRs provide a significantly weaker form of protection for fashion garments, as s.213(3)(c) CDPA excludes ‘surface decoration’ from protection. The CDPA requires a design to be original,¹⁰⁹ the meaning of which was refined in October 2014.¹¹⁰ The initial meaning - ‘not

¹⁰⁵ *PepsiCo Inc. v Grupo Promer Mon Graphic SA* C-281/10P [47] and [53] .

¹⁰⁶ *Magmatic Ltd v PMS International Group PLC* [2016] UKSC 12.

¹⁰⁷ *George Hensher Ltd. v Restawhile Upholstery (Lancs) Ltd.* [1973] 1 All ER 160.

¹⁰⁸ *DKH Retail Limited v H Young (Operations) Limited* [2014] EWHC 4034 (IPEC) [104].

¹⁰⁹ S. 213(1) Copyright, Designs and Patents Act 1988

¹¹⁰ Intellectual Property Office, Business Guidance on Changes to Law on Designs (June 2014, Government Publications), 7.

copied wholly from an earlier design'¹¹¹ - was replaced with the design must not be 'commonplace in the design field in question at the time of its creation'.¹¹² Following the clarification of the definition, 'commonplace' 'is now defined to mean 'common place in a specific area', namely the UK and EU.¹¹³ In *Superdry v. Animal*, the defendant argued that the claimant's 'academy gilet' was designed with reference to earlier designs and that it was 'commonplace', thus did not meet the 'originality' criteria required to benefit from UKUDR protection. The designer 'expended sufficient skill, effort and aesthetic judgment such that neither of the two designs presently in issue lacks originality because of such reliance'.¹¹⁴ On the second point, it was 'accepted that (a) the use of drawstrings for a hood, (b) a detachable hood and (c) central closure for a garment with an overlaying placket were all commonplace features at the relevant time'.¹¹⁵ However, the claimant's expert argued that the combination of these features was not commonplace.

Case law has not yet answered the specific question as to whether following a 'trend' in creating a garment offers a different overall impression to prior garments. Academics, including Atkinson, have claimed that

it may be relatively common that independently created garments have similarities that are not due to copying in a copyright [or design right] sense, but rather inspiration by a common third source, or inspiration by a common trend or fashion concept in a certain season'.¹¹⁶

This theory can be seen in the form of innumerable garments across high-street and online fast fashion retailers as these retailers follow trends to create affordable garments.

Chanel introduced metallic quilting in their Autumn- Winter 2017 collection and very quickly high-street and online stores were producing garments that followed this trend.¹¹⁷ High-end designers 'can be highly influential across the industry'¹¹⁸ as they create themes that can be adapted for the mass fast fashion market. These garments are not direct copies of the original Chanel garment but are very similar.¹¹⁹ It is likely that Atkinson's theory applies as such coats

¹¹¹ Lambert, J., *Enforcing Intellectual Property Rights* (2009, Gower Publishing: London) 47. See also *Farmer Build v Carier Bulk Materials Handling Ltd* [1998] EWCA Civ 1899.

¹¹² Section 213(4) CDPA 1988.

¹¹³ Intellectual Property Office, Business Guidance on Changes to the Law on Designs, 7.

¹¹⁴ *DKH Retail Limited*, [23].

¹¹⁵ *Ibid*, para. [47].

¹¹⁶ Atkinson, 'Comparative Study of Fashion and IP', 522.

¹¹⁷ See Look 47/98 Chanel AW17 (photo: <https://www.vogue.com/fashion-shows/fall-2017-ready-to-wear/chanel/slideshow/collection#47>).

¹¹⁸ Monseau, S., 'European Design Rights: A Model for the Protection of All Designers from Piracy', (2011) 48(1) *American Business Law Journal*, 27, 42. See also, Manlow, V., *Designing Clothes: Culture and Organisation of the Fashion Industry* (2009, Transaction: London) 47.

¹¹⁹ Miss Selfridge Metallic Oversized Puffer Jacket Winter 2017; boohoo.com Metallic Padded Coat Winter 2017; Topshop Metallic Puffer Jacket 2017; Lilylulu Metallic High Shine Padded Puffer Jacket Coat Silver.

look as if they have been designed 'with reference' to the trends of metallic silver, padding and quilting. Four such designs are similar yet have distinguishing features such as black fur and zips to create a different overall impression for each garment. The coats are inspired by the Chanel design but are not imitations; in this sense secondary designers are having to be innovative to form the trend into a functional garment. This is the process that IPRs aspire to stimulate rather than merely allowing secondary designers to plagiarize others garments.

Nevertheless, there are fast fashion companies that do not make any attempt to innovate, they purely imitate; Forever 21 is an example retailer. Until recently it has been claimed that Forever 21 did not employ any designers¹²⁰ and the company was sued 50 times within a five-year period.¹²¹ The retailer is commonly known for quickly creating knockoff copies of designer garments causing devastation to the likes of Anna Sui whose designs are frequently copied. The US's weak IP protection makes it difficult for designers like Sui to protect their garments from malicious copyists. In 2009 Sui 'handed out t-shirts bearing photographs of the founders of Forever 21' that read 'thou shalt not steal'.¹²²

Raustiala and Sprigman make the bold claim that 'if copying were illegal, the fashion cycle would occur very slowly'.¹²³ The main issue with this 'piracy paradox' theory is their failure to specifically describe or define copying and differentiate between different types of copying which may imply that following a trend is the same as copying a design. This raises the question as to whether it is the pursuit of new trends that drives the fashion cycle or whether it is plagiarism that forces designers to rethink and create new designs. In other words, is it a consumer-driven cycle in which the speed is increased to satisfy consumers' desire for 'new' or a cycle is driven by copyists increasing the speed of diffusion by imitation? This question amplifies the need to draw a clear distinction between imitation and inspiration.

Hemphill and Suk are explicit in their definition of copying, stating that it is a literal and direct process in which one targets the original for replication.¹²⁴ The authors propose the idea of three different levels of copying; the lowest being that consumers join a trend without an imitative motive, the next level would be designers who 'may engage in interpretation, or referencing'¹²⁵ and the highest level would be outright copying. Balmain's creative director

¹²⁰ Myers, E., 'Justice in Fashion: Cheap Chic and the IP Equilibrium in the United Kingdom and the United States,' 37 *American Intellectual Property Law Association Quarterly Journal*, 55, 67.

¹²¹ Jiminez, et al., 'Design Piracy Legislation', 68.

¹²² Ibid.

¹²³ Raustiala and Sprigman, 'The Piracy Paradox', 1722.

¹²⁴ Hemphill and Suk, 'The Law Culture and Economics of Fashion', 1159.

¹²⁵ Ibid, 1160.

Oliver Rousteing has stated 'I love seeing a Zara window with my clothes mixed with Céline... they go fast, they have a great sense of styling and how to pick up what they have to pick up from designers'.¹²⁶

It is essential that this 'Rousteing Interpretation' and joining or pursuing a trend is supported whilst IP law prevents outright plagiarism. The line between imitation and inspiration is a fine and somewhat blurred one in a trend-driven fashion industry. It is the job of intellectual property rights to distinguish to what extent aspects of a design may be copied from one designer to another before the copying becomes harmful to innovation. The process by which UK courts establish novelty and individual character works successfully with trends, with an examination of the evidence behind the design required, often allowing direct copyists to be caught. It is therefore submitted that the UK has a stronger level of protection than the US; yet the protection is not excessively heavy-handed so as to 'interfere with the normal process of fashion trending and adoption of ideas'.¹²⁷ It is interesting to see that, independent of exercising very different intellectual property protection, both the US and UK fashion industries remain successful.

3 Is the Success of the Fast Fashion Industry in Spite of or Due to Legislation?

'The turnover of fashion is just so quick and so throwaway, and I think that is a big part of the problem. There is no longevity' – Alexander McQueen

The fast fashion industry has changed enormously in recent times, 'particularly over the last twenty years, when the boundaries of the industry started to expand'.¹²⁸ Biannual seasons have been replaced by a one week design to shelf time¹²⁹ and copying between all levels of the fashion hierarchy¹³⁰ has accelerated the fashion cycle leading to the fast fashion industry we have today. The industry is 'characterized by several marketing factors such as low predictability, high impulse purchase, shorter life cycle, and high volatility of market demand'.¹³¹ Research has shown that speed to market, 'market responsiveness and agility

¹²⁶ Drohan, F., 'I love seeing a Zara Window With My Clothes: Why Balmain's Creative Director Is Happy For High-street Copycats', *The Independent Online*, 29 July 2014.

¹²⁷ Ibid.

¹²⁸ Bhardwaj and Fairhurst, 'Fast Fashion: Response to Changes in the Fashion Industry', 165. See also, Djelic, M. and Ainamo, A., 'The Coevolution of New Organizational Forms in the Fashion Industry: A Historical and Comparative Study of France, Italy, and the United States,' (1999) 10 (5) *Organizational Science*, 622-32.

¹²⁹ *The State of Fashion 2018* report, 8. See also, Bhardwaj and Fairhurst, 'Fast Fashion: Response to Changes in the Fashion Industry', 167.

¹³⁰ Raustiala and Sprigman, 'The Piracy Paradox', 1694.

¹³¹ Bhardwaj and Fairhurst, 'Fast Fashion: Response to Changes in the Fashion Industry', 168. See also Fernie, J. and L. Sparks., 1998. *Logistics and Retail Management, Insights into Current Practice and Trends from Leading Experts* (1998, London, Kegan Page).

through rapid incorporation of consumer preferences into the design process in product development' are essential in order to be profitable in the industry.¹³²

Raustiala and Sprigman believe that fashion challenges the orthodox rules of IP as weak IP endures design copying, escalating trend diffusion which works to speed up the fashion cycle. The authors claim that 'if copying were illegal, the fashion cycle would occur very slowly' and that 'design piracy and weak IP protection are actually good' for the industry. They believe that the vibrancy of the US fashion industry is due to knockoffs as lack of IP protection 'has not deterred investment in the industry'.¹³³ However, there is a lack of long-term economic evidence to support of this claim.¹³⁴ Strictly applying the idea of a politically stable low-IP equilibrium to other jurisdictions, such as the UK and France, would imply that their fashion industries are weak and propped up only by strong protection.

In fact, the opposite is true as France has strong IP protection for fashion designs which seems 'only to have cemented Paris's status as fashion capital of the world'.¹³⁵ LVMH, Dior, Kering and Hermes top the fashion companies' index,¹³⁶ all are based in Europe thus benefitting from CUDR. When ranked by market value Spanish Inditex - which owns fast-fashion giant Zara - sits in first place.¹³⁷ The Piracy Paradox theory fails to explain how European fashion companies are so remarkably successful in this low IP environment. Zara is well known for 'creating low-price couture imitations' while having to 'contend with Europe's rigorous protection for fashion designs'¹³⁸ the piracy paradox theory suggests that this is almost impossible. Raustiala and Sprigman claim the US and UK have different legal rules but similar fashion industry conduct.¹³⁹ This report seeks to present three potential reasons for the economic success of the UK and US fashion industries despite vastly different IPRs; the litigation argument, the novelty and individual character argument and the substitutes for IP argument. Hemphill and Suk indicate 'that in one five-year period the American company Forever 21 generated significantly more litigation than did its European counterparts Zara or

¹³² Ibid. See also Christopher, M. et al., 'Creating agile supply chains in the fashion Industry,' (2004) 32 *International Journal of Retail and Distribution Management*, 369.

¹³³ Raustiala and Sprigman, 'The Piracy Paradox', 1775,

¹³⁴ Jiminez. et al., 'Fast Fashion: Response to Changes in the Fashion Industry', 69.

¹³⁵ Ibid, 70.

¹³⁶ Fashion United, Top 100 Fashion Companies (by market capitalization) Index (accessed at: https://fashionunited.com/i/top100/?_ga=2.99521819.421449919.1504510406-1587162831.1504510406, last accessed on: 23 April 2018).

¹³⁷ Fashion United, Combined Top 200 Fashion Companies (accessed at: <https://fashionunited.com/i/top200>, accessed on: 23 April 2018).

¹³⁸ Jiminez, et. al., 'Fast Fashion: Response to Changes in the Fashion Industry', 71.

¹³⁹ Raustiala and Sprigman, 'The Piracy Paradox', 1735.

H&M'.¹⁴⁰ Many commentators agree they would 'expect to see more litigation over design piracy in the US than Europe because [the US] are a more litigious society'.¹⁴¹ Jiminez and Zerbo put Europe's low level of litigation down in part due 'to the context of highly protective design law, which acts as a deterrent'.¹⁴² It could be considered that the combination of weaker IP rights and the highly litigious society of the US actually produces a similar effect to the UK's higher IP protection and less litigious culture.

Secondly, in the UK and EU the line between imitation and inspiration is more sharply drawn than in the US thanks to the use of the concepts of 'novelty', 'individual character' and 'originality' which are used to determine whether a design is worthy of protection.¹⁴³ Clarifying this line makes it far easier to differentiate between a garment following a trend and a garment that is a copy. It is possible that the mere 'strength' of the UK unregistered design right acts as a preventive measure against copying; deterring piracy and forcing designers to reinvent trends rather than plagiarize entire garments.

Finally, Raustiala and Sprigman discuss first-mover advantage and creativity-enhancing copying as potential substitutes for IP rights in 'negative space' industries.¹⁴⁴ First-mover advantage is a period of *de facto* exclusivity 'that an innovator enjoys due to the practical difficulties of copying a particular innovation'.¹⁴⁵ This theory is unlikely to be directly applicable to the fast fashion industry although is easier to reconcile directly with luxury fashion. The authors describe the theory behind creativity-enhancing copying as 'copying sets trends that accelerate consumption of creative goods and, in turn, their production' thus 'creative incentives exist relatively easily with copying'.¹⁴⁶ This theory is directly linked to Raustiala and Sprigman's earlier Piracy Paradox theory. It can be seen that there is a substantial aggregate of alternatives to IP law that work in the US fashion industry to protect fashion designs.

In deciphering whether success is due to or in spite of legislation, the incentive to innovate must be examined. A designer's incentive to innovate is central to the fashion cycle as trends are set off by innovative designs, concepts or ideas.¹⁴⁷ Copyists may cause the dissemination of these trends but it is the innovation of the designers that powers the cycle back around to

¹⁴⁰ Jiminez, et. al., 'Fast Fashion: Response to Changes in the Fashion Industry', 72. See also Hemphill and Suk, 'The Law Culture and Economics of Fashion', 1172-3,

¹⁴¹ Raustiala and Sprigman, 'The Piracy Paradox', 1744.

¹⁴² Jiminez et. al., 'Fast Fashion: Response to Changes in the Fashion Industry', 72.

¹⁴³ Article 5 and 6 of EU Regulation 06/2002

¹⁴⁴ Raustiala and Sprigman, 'The Piracy Paradox', 2.

¹⁴⁵ Ibid, 13 and 18

¹⁴⁶ Ibid, 18.

¹⁴⁷ Zhang, D. and Di Benedetto, C., 'Radical Fashion and Radical Fashion Innovation', (2012) 4 *Journal of Global Fashion Marketing*, 195, 198.

create new designs. Hence, the success or failure of an IP system can simply be evaluated by whether or not a designer's 'incentive to innovate' is enhanced or restricted.

Searle and Brassell believe UK IRPs are 'a fairly straightforward fit for the 'incentive to innovate' theory' as 'designers receive property rights over the innovative designs and can use this to appropriate the returns for their investment in innovation'.¹⁴⁸ Design rights and copyright 'provide creators with a temporary legal monopoly over their creations' and exist to 'provide incentives for continued innovation and creation'.¹⁴⁹ The concepts of novelty and individual character allow for the protection of fashion designs where there has been direct plagiarism involved and where imitation of a design has occurred as in the case of *Superdry v Animal*.¹⁵⁰ It is imperative that designers are not deterred from innovation by a fear of plagiarism and the current UK IP framework does strike an appropriate balance to enable the 'incentive to innovate' theory.

The current level of IP protection for fashion designs afforded by UKUDR, CUDR and copyright is effective in the fashion industry at the moment. Raustiala and Sprigman remain the leading commentators in this area of law yet applying their piracy paradox argument to other jurisdictions does not explain their vibrancy or the success of the UK's fashion industry to develop an understanding as to why the industry is so vivacious in the face of strong IP protection. There are multiple potential reasons for the similar performances between the US and UK fashion industries despite the huge difference in intellectual property protection, and it is likely that a combination of all three arguments are behind the continued growth of the industry in the UK. Continued growth in spite of differing levels of protection indicate that perhaps the answer lies elsewhere. Hence, the UK fashion industry's success is likely to be in spite of legal protection as the US' industry is just as successful in spite of having weaker IP protection for fashion designs.

The State of Fashion Report highlights there is a high turnover of designers due to the 'accelerated pace of fashion prompt[ing] a creativity crisis';¹⁵¹ this implies the cycle has reached its peak speed, innovation is lacking and decelerating is essential. Consumers, fast fashion companies and the government need to work together to implement productive change in order to create a sustainable fashion future. Independent of IPRs the fashion

¹⁴⁸ Searle, N. and Brassell, M., *Economic Approaches to Intellectual Property*, (2016, Oxford University Press), 115.

¹⁴⁹ Ibid, 75.

¹⁵⁰ *DKH Retail Limited v H Young (Operations) Limited* [2014] EWHC 4034 (IPEC).

¹⁵¹ *The State of Fashion*, 21.

industry is innovative yet this innovation must be shaped and used to drive towards critical changes that result in a sustainable future.

Conclusion

‘Buy less, choose well, make it last’ – Vivienne Westwood

Raustiala and Sprigman conclude ‘The Piracy Paradox’ with the statement ‘fashion plainly provides an interesting and important challenge for intellectual property orthodoxy’.¹⁵² Fast fashion is an industry dependent upon trends and limited in creativity to functional garments, creating an unconventional relationship with IP law compared to other industries. In the fast fashion industry, the distinctions between complementary and conflicting policy, imitation and inspiration and positive and negative space can be lost. This article has outlined and compared the options for garment design protection in the UK and comparative jurisdictions, analysed whether the requirements for unregistered design protection work for a ‘trend’ based industry and evaluated the effect that intellectual property rights and competition policy have on the innovative fashion cycle. It has been considered whether the fashion industry is successful in spite of or because of IP legislation by a comparison to the significantly different US intellectual property framework. Additionally, a brief analysis of how IPRs are set to fare in an uncertain fashion future was offered.

The UK may not have specific provisions for fashion designs as does France, yet the framework of protection provided by unregistered rights offers opportunity for garments to be protected so long as designers keep sufficient evidence of the design process. Breaking down the requirements needed to attain unregistered design protection highlighted that ‘novelty’ and ‘individual character’ help to decipher the line between imitation and inspiration. In this way designers receive protection where there is merit while being inspired to innovate, allowing the pursuit of trends, facilitating the fashion cycle. Competition law is complementary to intellectual property protection for fast fashion designs as weaker IP rights do not grant market power or create monopolies unlike stronger IP. The UK IP framework is strong enough to allow designers to protect their garments from copying yet not too ‘heavy-handed’ as to restrict innovation and the flow of the fashion cycle.

This discussion has shown that in every respect the relationship between intellectual property, competition policy and the fast fashion industry requires a vital balancing act. A balance that is currently precariously even in the UK but liable to be tipped by future developments.

¹⁵² Raustiala and Sprigman, ‘The Piracy Paradox’, 1775.

Forecasters believe companies 'must continue to be vigilant and nimble in order to adapt to an ever- changing environment but they will increasingly focus on directing their energies towards what is within their control.¹⁵³ At present in the UK the protection of fashion garments by IPR is assured as the designer can rely on copyright and unregistered design rights. It is not possible to predict the evolution of the relationship between IRPs and the fashion industry in the face of a wave of forthcoming challenges. This critique has, however, established that dramatic change is inevitable from this unsustainable industry.

¹⁵³ *The State of Fashion 2018* report, 18.